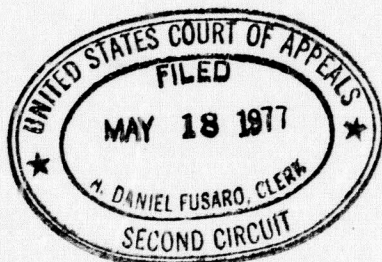


***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6062



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U. S. DISTRICT COURT
FOR THE SECOND CIRCUIT
NO. 77-6062

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P/S

SECURITIES AND EXCHANGE COMMISSION
PLAINTIFF-APPELLEE

V.

RESEARCH AUTOMATION CORPORATION
BASIL MARTOS, KONSTANTINOS M. TSERPES
AND ATHAN HAMOS

Defendants

KONSTANTINOS M. TSERPES and BASIL MARTOS

DEFENDANTS-APPELLANTS

72 CIVIL 3513

APPELLANTS BRIEF

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STATEMENT OF THE ISSUES

Where the Circuit Court of Appeals at a prior appeal remanded the proceedings to the District Court for "finding of facts" on the issue of fraud in a proposed Regulation A exemption offer, can the District Court permanently enjoin a corporation and the appellants (Tserpes and Martos) without there existing any facts, any claims, nor any violations against the appellants and without a hearing on the germane issue of fraud? .

STATEMENT OF THE CASE

NATURE AND COURSE

On August 17, 1972 the Commission commenced an action for permanent injunction against the defendants from alleged violations of Section 5 and 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Act of 1934 and Rule 10b-5 thereunder. The Commission also moved for a preliminary injunction at about the same time. On November 8, 1972 the District Court issued an order for preliminary injunction.

The defendants appealed the order to the Court of Appeals. On March 9, 1973 the Court of Appeals remanded the case to the District Court to make further findings of facts.

Thereafter on October 23, 1973 the District Court issued an order dismissing the complaint as to the alleged violations of Section 5 of the Securities Act of 1933 and vacating the preliminary injunction.

On August 7, 1974 the District issued a permanent injunction against Research Automtion Corporation and K. M. Tserpes.

Thereafter Tserpes, answering and appearing pro-se, appealed the order to the Second Circuit of Appeals.

On July 12, 1975 the Court of Appeals reversed the District Court's Order for K stantinos M. Tserpes and affirmed the entry of default judgement (on RAC) without prejudice to its right to reopen the judgement in the District Court and appear through counsel.

Subsequently the Corporation through lawyers moved to reopen the case in the District Court (to vacate the permanent injunction)--and after five lawyers approached the plaintiff (which lawyers refused to continue after talking with the SEC's representatives) one of the Corporation's lawyers (Steve Giano, Esq.) moved for relief pursuant to the Court of Appeal's decision of July 12, 1975.

The District Court completely disregarded the defendant's efforts and granted the Commission all of the relief which it sought. The District Court's order states: "the defendants failed to request a pre-motion conference prior to filing the instant motion as was ordered by the Court on October 6, 1976". The order of October 6, 1976 states: "The defendants Martos, Tserpes and Hamos request from this court a pre-motion conference and await outcome of such conference prior to filing any further motion". Nowhere therein is there reference to the Corporation making such a request--therefore, the District Court erred in its decision, ignored the Court of Appeal's order of July 12, 1975 and granted the Commission the relief it requested, which was both erroneous and not righteous.

DISPOSITION BELOW

On February 24, 1977 the District Court entered an order denying Defendants motion to vacate judgement of Permanent Injunction against defendant RAC and to dismiss the balance of the complaint against defendants Tserpes, Martos and Hamos, which motion was made by Steve Giano, attorney for the defendants.

The District Court completely disregarded defendant's efforts and signed the proposed order submitted by the Commission (Plaintiff), thus once again repeating its prior actions (which is clear discriminatory) and granting the Commission all of the relief which it sought. (i.e.: Two previous orders which granted the Commission the relief it requested were appealed--in one instance it was returned to the District Court for "finding of facts" and the second instance--the Appeals Court reversed the District Court's order for Tserpes".

FACTS

The germane fact relating to the principal issues in chief are set forth in the written affidavits, memoranda, and objections filed with the District Court.

In substance the facts are that: the Appellee failed to prosecute the action, held it dormant for four years purposely to damage the company and the defendants, acted in a dilatory manner with respect to further proceedings; there is no

jurisdictional basis for the anti-fraud allegation as this evaporated with the acknowledgement that the appellants were not a public company subject to registration under the Securities Act and confirmation of this fact by the Court dismissal of all charges in the complaint relating to Section 5 of the Securities Act of 1933.

There was no fraud committed by the appellants within the meaning and intent of the Securities Law and regulation.

On November 1976 the Appellants lawyer (Steve Giano, Esq.) moved to vacate the permanent injunction and dismiss the balance of the complaint, which have injured, damaged the appellants, their reputation and their civil rights.

All of the issues raised by the motion were referred to Honorable Magistrate Sol Schreiber to hear and report--and innumerable hearings and conferences were conducted.

On February 24, 1977 the District Court entered order denying the defendant's motion of November, which referred to under NATURE AND COURSE--PAGE 4--Paragraph 3, and which was erroneous.

The District Court did **exactly** what Mr. Moran of the Securities and Exchange Commission ordered and did not take into consideration the actual facts..Is this what we call justice? For this very reason we are seeking our justice through the Appeals Court, which Appeals Court will reach a decision which will bring the justice the defendants are seeking.

ARGUMENTS

SUMMARY

1) The sale of stock to informed relatives and friends of the Issuer prior to the filing for Regulation A exemption renders such sales exempt as Section 4(s) sales.

2) The Purchaser being all New York residents and the Issuer being all New York residents and the issuer being a New York Corporation, such sales were made to do production, demonstrations and meet the Corporation's obligations, and exempts the transaction as Section 3(11) sales.

3) The alleged misleading statements or omissions in information to investors, were not material to their investment decision thereby not constituting Section 17 violation.

These factors being as stated, the balance of the complaint should be dismissed and the Regulation A offering (with the appropriate amendments) should be approved by the Commission.

POINTS

POINT 1

The Appeals Court made a determination on the District Court's order of preliminary injunction remanding the case to the District Court for "finding of Facts" and on October 23, 1973 the District Court vacated the preliminary injunction and dismissed the alleged violation of Section 5 of the complaint.

Defendants have maintained their burden by proving that the sale of stock to 92 named in the affidavits were exempt from registration, Ralston-Purina 346 US119, Custer Channel Wing 347F Supp 481, Lynn v. Caraway 252 F Supp 858 Gilligan Will 267 F 2d 461 Sunbeam Gold 95F2d 699.

There was no public need for registration where, as here, the purchasers were close friends and relatives familiar with the company and its principals. Hill-York Corp v. Amer.Int.Franchises 298 F Supp 1221, 448 F 2d 680, Lively v. Hirschfeld 440 F 2d 631, Garfield v. Strain 320 F 2d 116. The test is not sophistication nor the number of stockholders, but could the stockholders fend for themselves; Hill-York Corp. v. Amer. Inter. Franchises (Supra).

The purchasers were related and informed, thereby qualifying for exclusion from registration SEC 4552 (1963).

POINT 2

The sales are further exempt as intrastate dealing, every purchaser being a resident of New York State and the issuer a New York Company. Chapman v. Dunn 414 F2d 160 44 NYUL Rev 1198.

The issuer and purchasers were all residents of a single state, New York. SEC Act Rel. 4434 (1961). There was no effort to combine the offering with one to non-residents under the Regulation A exemption. Shaw v. U.S. 131 F 2d 476 (1942). The sales involved were not part of the Regulation A offering so as to be treated as an integrated part of the same. The prior sales were to raise funds for production, demonstrations to prospective customers and meet the corporation's obligations. No shares were sold after the filing in March 1972. All shares were made to informed friends and relatives.

POINT 3

The defendants sold stock in good faith convinced of the economic soundness of the Corporation's products and the program. Sparrow v. U.S. 402 F 2d 826 (1968). They made no baseless, false, or reckless representations to induce investors to purchase stock. Elbel v. U.S. 346 F 2d 126 (1966).

As provided in Sec 17 of the Act, fraud is measured by the objective standard of "those matters an average prudent investor ought to reasonably know before buying". SEC v. Great American 407 F 2d 833 (1968). The investors knew defendants' relationship to the issuer. SEC v. Torr 15 F Supp. 315 (1936). The "average prudent investor" who were friends and relatives of the defendants were not materially influenced by technical distinctions in patent law, or by the Commission accounting rules insisting on cost evaluation; Their basis investment decision, and the material

ingredient therein , was made in reliance on the technical expertise of Tserpes and the nature of the Transfer Unit.

POINT 4

The District Court was not justified in denying the motion to vacate the Permanent injunction on the corporation and dismiss the balance of the complaint without considering the sharp factual dispute crystallized in defendants affidavits, briefs, opposition papers. SEC v Frank, Supra. It is incumbent on the Court to consider the bonafides of defendant's intention to comply with the commission's directives, the effectiveness of the discontinuance and the character of any past violations, U.S. v. W.T. Grant, Supra, before issuing any order on motions.

POINT 5

The above orders, complaints, injunctions were all based on investigations and interrogations made by the plaintiffs(SEC) to the defendants and the "private stockholders" of the Company without an interpreter and as you will note in Mark N. Jacob's first affidavit--he classifies the company's stockholders as "unsophisticated Greek Immigrants who don't know how to read nor write". All of the transcripts were incorrectly transcribed due to the language barrier, and thus the Company and its officers were falsely accused, and seek justice through the higher courts.

CONCLUSION

Defendants respectfully request the following relief be granted:

1. The permanent injunction should be vacated.
2. The balance of the complaint be dismissed.
3. The Commission should be directed to approve the Company's Regulation A offering (with the appropriate amendments).